SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1986

INDUSTRO MOTIVE CORPORATION AND
HENRY G. MICHAEL,
Petitioners,

vs.

MONOGRAM MODELS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioners, Industro Motive Corporation, a Michigan corporation, and Henry G. Michael, pray that a writ of certiorari issue to review the Judgments of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on March 12, 1974, and April 10, 1974.

OPINIONS BELOW

The first judgment of the district court (50a) granting Petitioners' motion for summary judgment, is unreported. The opinion of the Court of Appeals reversing the trial court (A3-A10) is reported at 448 F.2d 284. The second judgment, following trial in the district court, is unreported. The opinion of the Court of Appeals on the second appeal is reported at 492 F.2d 1281-1288. The order of the Court of Appeals denying the motion for rehearing is unreported.

JURISDICTION

The final order of the Court of Appeals is dated April 10, 1974 and was entered the same day. The jurisdiction of this court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Is copyright protection under the Copyright Act extended to works which do not belong in any of the classifications of works for registration described in 17 U.S.C.?

2. Where a party files interrogatories in April, 1969, the trial judge assigned at that time rules those relating to damages need not be answered until a later stage of the case, the proponent takes no further steps of any kind to obtain answers and first raises the question of defendants' failure to answer after two days of trial, may the trial judge on his own motion, under F.R.C.P. 37, default defendants on the issue of damages without previously entering a written order directing defendants to answer?

3. Where a case for injunctive relief and damages for infringement of a copyright is tried to a jury, and during the trial the defendant is defaulted by the court for having failed to answer interrogatories, may the court take the issue of damages to be awarded plaintiff from the jury and decide the amount itself under F.R.C.P. 37(b)(2) (ii) and (iii)?

4. Is the opinion of the Court of Appeals so much in conflict with the provisions of the Copyright Act as to amount to a denial of due process of law?

CONSTITUTIONAL PROVISION INVOLVED

Amendment VII—Civil Trials

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law. (U.S.C.A., Constitution, p. 696).

STATUTES INVOLVED

Copyright Act of 1947, as amended:

"Sec. 3. The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright. . . . 17 U.S.C. p. 47.

"Sec. 4. The works for which copyright may be secured under this title shall include all the writings of an author. 17 U.S.C. p. 49.

"Sec. 5. The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations.

(b) Periodicals, including newspapers.

(c) Lectures, sermons, addresses (prepared for oral delivery).

(d) Dramatic or dramatico-musical compositions.

(e) Musical compositions.

(f) Maps.

(g) Works of art; models or designs for works of art.

(h) Reproductions of a work of art.

(i) Drawings or plastic works of a scientific or technical character.

(j) Photographs.

(k) Prints and pictorial illustrations including prints or labels used for articles of merchandise.

(l) Motion-picture photoplays.

(m) Motion pictures other than photoplays.

(n) Sound recordings.

The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title, nor shall any error in classification invalidate or impair the copyright protections secured under this title. 17 U.S.C. p. 50.

"Sec. 13. After copyright has been secured by publication of the work with the notice of copyright as provided in section 10 of this title, there shall be promptly deposited in the copyright office or in the mail addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published. . . . No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with. 17 U.S.C. p. 103.

"Sec. 19. The notice of copyright required by section 10 of this title shall consist either of the word 'Copyright' or the abbreviation 'Copr.', accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k) inclusive, of section 5 of this title, the notice may consist of the letter C enclosed within a circle, thus ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: *Provided*, that on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. 17 U.S.C. p. 111.

"Sec. 101. If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of $200 nor be less than the sum of $50, and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures . . . such damages shall not exceed the sum of $100; and in the case of

an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures . . . the entire sum of such damages recoverable by the copyright proprietor . . . shall not exceed the sum of $5,000 nor be less than $250, and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. . . .

First. In the case of a painting, statue or sculpture, $10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;

Third. In the case of a lecture, sermon, or address, $50 for every infringing delivery;

Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, $100 for the first and $50 for every subsequent infringing performance; in the case of other musical compositions $10 for every infringing performance; . . ." 17 U.S.C. pp. 157-158.

RULES AND REGULATIONS OF THE COPYRIGHT OFFICE

37 C.F.R. Sec. 202.2 (17 U.S.C. pp. 181-182, 1974 Supp.):

"(a) General. (1) With respect to a published work, copyright is secured, or the right to secure it is lost, at the date of publication, i.e., the date on which copies are first placed on sale, sold, or publicly distributed, depending

upon the adequacy of the notice of copyright on the work at that time. . . .

"(b) Where the notice does not meet the requirements of the law, the Copyright Office will reject an application for copyright registration. Common defects in the notice include, among others, the following: . . .

(3) The notice is not in one of the positions prescribed by law;

(4) A notice is permanently covered so that it cannot be seen without tearing the work apart;

(10) A notice is on the wrapper or container which is not a part of the work and which will eventually be removed and discarded when the work is put to use. . . ."

STATEMENT

This is an action for injunctive relief and damages for alleged violation of plaintiff's copyrights on its F-105 Thunderchief and A1-E Skyraider "ready-to-assemble plastic kits for scale model airplanes sold for hobby and recreational pursuits". (T. 9). Jurisdiction rests on 17 U.S.C. 1 et seq. Plaintiff is an Illinois corporation. Defendants, Henry G. Michael and Industro Motive Corporation, a Michigan corporation, are domiciled in the Eastern District of Michigan, Southern Division.

The pieces of the kit are molded, then placed in a cardboard carton with an instruction sheet for the assembly of the plane and the component parts thereof; that is, there are sub-assemblies of certain parts of the model craft. The cover of the carton is imprinted with pictures of the real aircraft in flight, and advertising and descriptive matter. The whole is enclosed in a heat-sealed transparent plastic

wrapper and the consumer does not see any part of the plane itself until after purchase. No claim is made that defendants copied any part of the literary or pictorial work on the carton or in the instruction sheet, and a quick glance at either is sufficient to demonstrate there would be no basis for such a claim. No argument is made that these portions of the kit are not proper subject matters for copyright. This case relates solely to the copyrightability of the component parts of the plane and the aircraft assembled from the kit. There are 35-40 pieces in each kit. (Exs. A and B).

Plaintiff registered its Thunderchief kit in Class A, giving as title:

> F-105 THUNDERCHIEF, being a container and instruction sheet for the assembly of a scale model airplane and the components thereof. (448 F.2d 287, fn.).

There is a notice of copyright on the carton and instruction sheet, but no notice on any part of the plane. The kit was first published in 1959. (T. 139). There is no evidence as to notice of copyright in 1959 but the plaintiff conceded no copyright was ever registered prior to 1966 after modifications had been made in a few pieces of the plane in the cockpit area. (T. 139-142, 186).

Defendants' position with reference to the Thunderchief is: the registration is ambiguous (as to whether it covers the literary and pictorial elements only, or also covers the component parts of the plane) and should either be construed against plaintiff or the issue of plaintiff's intent submitted to the jury; that once it was shown the kit had been published seven years prior to registration of a slightly modified model, the burden of proof shifted to plaintiff to show the earlier publication was with notice and the notice on and registration of the present model could apply only to the modifications made in 1966.

The A1-E Skyraider was registered in 1968 in Class G as follows:

"Title: A1-E Skyraider

"Nature of Work: Scale Model Airplane." (448 F.2d 287, fn.).

The only notice of copyright on the Skyraider is on the inside of the underside of the wing section. When the plane is assembled, this notice cannot be seen as it is securely cemented inside the complete wing.

As to both kits, defendants have consistently taken the position that scale model airplane (or car, boat, truck or whatever) kits are not the proper subject of copyright protection; that the notice requirements of the statute and regulations have not been met by plaintiff; that there has been no substantial copying by defendants of either of plaintiff's kits; that no damages were proved by plaintiff and the amount awarded by the court is in excess of the statutory limit; the above issues all present questions of fact for the jury and the court deprived defendants of their right to have them submitted to the jury.

In its first opinion, in which it reversed the summary judgment granted plaintiff by the Hon. Talbot Smith, on November 23, 1970, the Court of Appeals for the Sixth Circuit held that the copyrightability of scale plastic model airplanes was a legal question and went on to rule that "scale plastic model airplanes are proper subject matter for copyright protection". (444 F.2d 285, 288). The cause went before the Hon. Charles W. Joiner to trial on the theory that it was the airplanes themselves we were concerned with—whether assembled or unassembled.

In its opinion on the appeal following trial, however, the Court of Appeals for the Sixth Circuit stated that its earlier opinion referred to scale model airplane *kits* and added:

> "Thus it is neither the assembled plane, as a structure, nor the individual pieces of the unassembled plane, that are the proper subject for copyright protection. It is the scale model kit, as a kit, that is copyrightable." (492 F.2d 1281, 1284).

Whereas, under the first ruling the question of the adequacy of notice was of great importance, under the second opinion the question of the extent of copyright protection under Section 3 of the Act assumed great importance and the basis for the relief granted was completely undercut as the Court of Appeals, on the one hand, held that neither the plane nor the unassembled pieces were the proper subject for copyright protection—and then upheld an award of damages for having copied these unprotected parts of the kit and an injunction forbidding defendants from publishing, selling, marketing, or otherwise disposing of any copies of plaintiff's copyrighted ready-to-assemble model airplanes . . . and any components thereof, and any model airplanes constructed therefrom; and further required the surrender of molds and other equipment for the production of defendants' kits. After defendants filed their petition for rehearing on the new issues raised by the Court's opinion, *plaintiff* filed a "Motion to Amend the March 12, 1974, Judgment, in Formal Particulars" and requested the Court of Appeals to modify the above-quoted language to read:

> "Thus it is the scale model airplane kit, as a kit, that is copyrightable. We make no holding as to whether an assembled scale model plane, as a structure, or the individual pieces of an unassembled scale model plane, would be proper subjects for copyright protection if published apart from their inclusion in kits."

The Court of Appeals for the Sixth Circuit denied both the petition for rehearing and plaintiffs' motion.

The issues relating to the construction and application of Rule 37 of the Federal Rules of Civil Procedure arose thus:

Defendants timely demanded a jury trial but the case went to the jury on the issue of infringement only. Immediately after commencing suit, plaintiff filed interrogatories and defendant responded to all questions propounded excepting those relating to damages. (T. 130; and see transcript attached to petition for rehearing). Judge Smith ruled, in connection with a hearing on unrelated matters, that defendants need not answer such questions at that time (April, 1969). Subsequently, he entered summary judgment for plaintiff and therein ordered an accounting. (T. 50-51). This judgment was reversed by the Court of Appeals for the Sixth Circuit on September 17, 1971.

About a week before trial, which commenced December 19, 1972, plaintiff subpoenaed defendant, Henry G. Michael, to appear as a witness on that date *only*. (T. 128). Mr. Michael did appear but was not called. He was present part of the following day and then left. No other subpoena was served on him. At that time, the plaintiff claimed his presence was necessary to their proof of damages. Argument was had as to whether the subpoena, requiring attendance on one day only, also served to require his presence for the entire trial or until plaintiff released him. (T. 69-75). The District Judge originally took the position he could find Mr. Michael in contempt of court for failing to appear during the entire trial; and then switched to the position that inasmuch as defendants had failed to answer interrogatories propounded over 3-1/2 years before (as to which there was a complete absence of any effort on plaintiff's part to compel answers, either by informal means or motion) the court could default the defendant on the issue of damages under F.R.C.P. 37—and proceeded to do just that. Further, the court took the position that,

having defaulted the defendants on the issue of damages, it could take this issue from the jury and decide it itself. (T. 128-138; 173-184; 195-199). The jury returned its verdict on December 27, 1972. The order directing defendants to answer plaintiff's interrogatories as to damages was entered February 15, 1973. (T. 88). Defendants' answer was filed February 27, 1973. (T. 89). The district court entered final judgment for injunctive relief and damages on March 6, 1973.

Defendants filed petition for writ of mandamus and prohibition prior to the entry of judgment on the ground that the trial court was without jurisdiction to dismiss the jury and enter a judgment for damages against defendants, even if defendants had been properly defaulted. The trial judge entered the judgment while this petition was pending in the Sixth Circuit, the petition was amended to reflect this event, and then denied by the Court of Appeals for the Sixth Circuit on April 20, 1973. The plaintiff garnisheed the defendants' bank accounts while the petition was pending, sequestering some $37,000 in funds, needed to continue operation of defendants' business.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Sixth Circuit has decided an important question of federal law which has not been, but should be, settled by this court.

2. The Court of Appeals for the Sixth Circuit has decided a federal question in a way in conflict with applicable decisions of this court.

3. The Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

ARGUMENT

1. The Court of Appeals for the Sixth Circuit has decided an important question of federal law which has not been, but should be, settled by this court.

In 1954, in the dissenting opinion in *Stein* v. *Mazer*, 74 S.Ct. 460, 347 U.S. 204, 219, 98 L.Ed. 630, the question was raised as to whether Congress had the power to provide for copyrights on any subject matter other than literary works.

This case goes to the outer limits of the other side of the spectrum and raises the issue as to whether there are any limitations at all on what may be copyrighted under the Copyright Act.

Defendants have consistently asserted that scale model airplane hobby kits are not copyrightable, because they are not included in any of the classes in which copyright may be claimed as set forth in Section 5 of the Copyright Act; and, that whether they are included in any of these classifications is a question of fact for the jury. The Court of Appeals overruled both contentions, holding in its opinion setting aside the summary judgment that the copyrightability of scale model airplane kits is a legal question and that in view of the language in the final paragraph of Section 5 of the Copyright Act the question of classification is of no consequence. 448 F.2d 285, 287.

The plaintiff registered its Thunderchief in Class (a) as a book, and its Skyraider in Class (g) as a "work of art; model or design for a work of art". Because of the ruling of the Court of Appeals in its first opinion, during trial the court refused to require the plaintiff to state in which of the classes it claimed the hobby kits properly belonged (171a-172a) and precluded defendants

from introducing any evidence to show that scale model airplane kits are not included in any of the classes. It has been held by at least one court that whether a work is copyrightable as a work of art is a question of fact for the jury. *Stuff* v. *LaBudde Feed & Grain Company*, 1941 D.C. Wisconsin, 42 F. Supp. 493.

In its second opinion, the Court of Appeals reaffirmed its earlier ruling (492 F.2d 1284, 1286) and there relied on the language to the effect that any error in classification does not invalidate a copyright. This decision begs the question which is not whether the scale model airplane kits were registered in the wrong classification but whether there is any classification in which they may properly be registered and, if not, whether plaintiff has any standing to assert any rights under the Copyright Act.

Defendants' position that the classification of works for registration limits the subject matter of copyright to the classes specified in Section 5 is based on (1) the history and language of the Copyright Act; (2) the decisions of other federal courts to the effect that certain items are not copyrightable and that whether they are copyrightable is a question to be litigated; and (3) the practice of the industry. The history of the Copyright Act has been one of constantly adding to the classes of work in which the copyright may be registered. The Copyright Act of May 31, 1790 limited the subjects of copyright to three—maps, charts, or books. Other classes were added over the years, until they presently number 14. The requirement that the application for registration specify to which of the classes the work in which the copyright is claimed belongs indicates that Congress did not contemplate other works would be copyrighted. The last paragraph of Section 5 does not furnish any basis for an assumption that the phrase "All writings of an author" in Section 4 is any

broader than the definition of "writings" in Section 5 and, in fact, it may be limited to the narrower meaning of literary production. As for the effect of an error in classification, defendants have never contended this would defeat a valid copyright; what defendants say is that there is a difference between an error in classification and the complete absence of any classification which reasonably includes scale model airplane hobby kits. Neither the District Court nor the Court of Appeals discussed this issue in these terms. Additional support for defendants' position is found in Section 101(b) of the Copyright Act wherein the provisions for damages are keyed to the classifications in Section 5. Other Federal courts have held that certain works are not proper subject matter for copyright. See, for example, *Bailie* v. *Fisher,* 1958, 258 F.2d 425, wherein a cardboard star with flaps, which, on being folded back would make it stand for display, was held not a subject matter for a copyright. While neither case involves the very narrow, precise issue raised here, both *Stein* v. *Mazer, supra,* and *Goldstein* v. *California,* 1973, 412 U.S. 546, 93 S.Ct. 2303, 37 L.Ed.2d 163, revolve entirely around the question of whether statuettes used for lamp bases, in *Stein,* and sound recordings, in *Goldstein,* were proper subjects of copyright protection under the Copyright Act. Under the ruling of the Court of Appeals for the Sixth Circuit that "The fact that these classifications are perhaps not accurate descriptions of the subject matter sought to be copyrighted apparently is of no consequence" there would be no litigable issues in the above cases. 492 F.2d 1281, 1284. It would appear from the conclusion of the Court of Appeals for the Sixth Circuit that that court gave a reverse twist to the question which distorted the issue and led to a conclusion in direct conflict with statutory and case law.

Finally, this case is of great importance because it has not been the practice in the industry to attempt to copyright scale model hobby kits. The logical copyright holders would, of course, be the aircraft and automobile companies themselves, rather than the toy manufacturers, inasmuch as the former have first access to the plans and specifications for their original, full-sized vehicles and would stand to benefit most from licensing for the production of scale models. There has been no such movement among them which might also indicate that these companies do not believe scale model hobby kits are copyrightable. With practically no attempt to secure copyright protection, the model industry grew from sales of approximately $100 million dollars in 1949 to $792 million in 1968; and over one billion dollars in 1971 according to figures collected by the Hobby Industry Association of America, Inc., and published in a trade journal. *Toys*, February, 1972, page 88; December, 1972, page 42. Under these circumstances it is difficult to demonstrate any practical need for copyright protection to encourage production of these kits.

2. The Court of Appeals for the Sixth Circuit has decided a federal question in a way in conflict with applicable decisions of this court.

The question here is: Does a party who has been defaulted by the court forfeit its right to trial by jury of the issues of fact as to damages where the damages are not liquidated?

The jury in this case was duly demanded and impaneled but the court took the question of damages from it and limited its function to determining whether defendants had infringed plaintiff's alleged copyrights. The amount of damages in a copyright action is for the jury.

Dairy Queen, Inc. v. *Wood*, 1962, 82 S.Ct. 894, 369 U.S. 469, 8 L.Ed.2d 730. *Dockman* v. *Hollzer*, C.A. 9, 1946, 152 F.2d 730. The sole effect of the entry of a default is to deprive the party defaulted of the right to put in proofs; it does not relieve the other party of the necessity of proving its case. 47 Am. Jur. 2d, Sec. 1189, Judgments. F.R.C.P. 55 (b) (2). See also *Bass* v. *Hoagland*, 172 F.2d 205, 208-209, C.A. 5, 1949.

In order to determine the proper basis for damages in a copyright case, it would be necessary for the jury to first determine in which of the classifications of subject matter for copyright the scale model airplane kits fall. On one hand, if the jury should find that scale model airplane hobby kits are properly registerable as a work of art, in Class (g) and, further, that they are a form of sculpture, then plaintiff would be entitled to ten dollars for every infringing copy made or sold by or found in defendant's possession; if these kits properly fall into Class (i), as a plastic work of a scientific or technical character, then plaintiff would be limited to one dollar for each copy. If the kits do not fall into any of the classifications of works for registration then it must be determined whether there is any provision for damages in Section 101 of the Act.

This court has previously held that the trial of all facts in a case must be to a jury—unless the parties have stipulated in writing for the waiver of a jury.

"It was the province of the jury to pass upon the issues of fact, and the right of the defendants to have this done was secured by the Constitution of the United States. They might have waived that right, but it could not be taken away by the court. Upon the trial, if all the facts essential to a recovery were undisputed, or if they so conclusively established the cause of action as

to have authorized the withdrawal of the case altogether from the jury by a peremptory instruction to find for plaintiffs, it would still have been necessary that the jury make its verdict, albeit in conformity with the order of the court. The court could not consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and, itself, determine the remainder without a waiver by the defendants of a verdict by the jury. In civil cases, other than those in equity and admiralty, and except where it is otherwise provided in bankruptcy proceedings, 'the trial of issues of fact'—that is, of all the material issues of fact—'in the Circuit Courts shall be by jury' unless the parties, or their attorneys of record, stipulate in writing for the waiver of a jury. Rev. Stat., Secs. 648, 469. There is no such stipulation in this case, and there is nothing in the record from which such stipulation or waiver may be inferred. It has been often said by this court that the trial by jury is a fundamental guarantee of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver.

"For these reasons the judgment below must be reversed." *Hodges* v. *Easton*, 106 U.S. 408, 412, 1 S.Ct. 307, 27 L.Ed. 169 (1882).

3. The Court of Appeals for the Sixth Circuit has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

We are well aware that this court seldom grants certiorari on this ground; on the other hand Courts of Appeals seldom change their opinions in the same case with the result that an entire industry is thrown into confusion,

future litigation invited and the defendants blatantly deprived of their day in court.

In its first opinion, the Court of Appeals decided that the issue of copyrightability is a legal question and then proceeded to rule that scale plastic model airplanes are copyrightable. (448 F.2d 285, 288). The Court of Appeals did not state in what classification the airplanes should be registered. We submit that whether the subject matter of this action belongs in any of the classses in which works may be registered with the copyright office and, if so, in what classification it belongs, is a question of fact for the jury because contradictory inferences may be drawn from the undisputed facts. *Cole* v. *Chevron Chemical Co.*, C.A. 5, 1970, 427 F.2d 390.

In its opinion on the first appeal the Court of Appeals also held that whether the registration of the Thunderchief covered only the art work on the container and the instruction sheet, or also covered the component parts of the plane, and the adequacy of the copyright notice on each of the planes were questions of fact for the jury. (448 F.2d 285, 287). There was no notice of copyright on any part of the Thunderchief components. Notwithstanding this ruling, during the pre-trial proceedings the trial court directed the parties to "frame a question for a decision by the court" on these two questions. (59a). Subsequently, with no evidence whatsoever on the subject excepting the plaintiff's assertions, the trial court held that as to the Thunderchief "It was clearly the intention of the plaintiff to copyright the component parts of the kit as well as the container and instruction sheet"; and further held that the notices on the outside of the carton and on the instruction sheet were sufficient because "Both the box intended to hold the parts of the assembled plane and sheet of instructions were very much a permanent

part of the kit for the assembly of the plane". (66a-69a). On this basis the trial court held inapplicable the line of cases which hold that notice of copyright placed on labels and containers that are intended to be discarded are not sufficient notice to protect the copyright—even though, here, the instruction sheet is useless after the plane is assembled and the assembled plane will not fit into the container. Would a jury incontrovertibly determine this instruction sheet and container were not meant to be discarded? *Ross Products, Inc.* v. *New York Merchandise Co.*, D.C. N.Y., 1964, 233 F. Supp. 260.

There are just three facts with reference to the notice on the Thunderchief kit: (1) It appears on the container and instruction sheet; (2) it does not appear on any component of the plane; (3) it is registered with the Copyright Office in Class (a) as a literary property. Under these facts, why must a jury inevitably conclude that the plaintiff intended to, and did, copyright the component parts of the plane or the assembled plane? *Bolles* v. *Outing Co.*, 1899, 175 U.S. 262, 268, 20 S.Ct. 94, 44 L.Ed. 156, affirms, on other grounds, the decision of the lower court which held the question of the adequacy of the copyright notice is for the jury—the issue there being one of legibility.

As to the Skyraider, the question is one as to whether no possible inference of inadequacy may be drawn where the notice of copyright appears only on the inside of a wing section which is not visible after assembly, but the wider question is: on how many pieces of the plane should the notice appear? There is no evidence the defendants ever saw this notice and the only part of the Skyraider they are accused of copying is the tail section which is wholly separate and apart from the wing section. (149a-152a).

The Court of Appeals was correct in its holding on the first appeal that the adequacy of the copyright notice was one of fact for the jury; and incorrect in its holding disposing of the second appeal that, the facts being undisputed, the question became one of law. Even then, to develop a basis for its holding on the second appeal, the Court of Appeals felt forced to redefine its terms and rule that it was the kit, rather than the plane or its components that is copyrightable and therefore notice on certain portions of the kit was adequate.

Defendants were further injured by the trial court permitting the plaintiff to call an expert witness to testify over defendant's objections as to the similarities between the component parts of the plaintiff's and the defendant's planes; indeed, this constituted practically plaintiff's entire case. (106a-115a, 118a-119a). The rule is well established that the "question of infringement is dependent upon whether the ordinary, reasonable person would fail to differentiate between the two works or would consider them dissimilar by reasonable observation." *Williams* v. *Kaag Manufacturers, Inc.*, C.A. 9, 1964, 338 F.2d 949, citing *Hein* v. *Harris*, C.A. 2, 1910, 175 F. 875. To the same effect see *Bradbury* v. *Columbia Broadcasting System, Inc.*, C.A. 9, 1961, 287 F.2d 478; *Ideal Toy Corp.* v. *Fab-Lu Ltd.*, C.A. 2, 1966, 360 F.2d 1021; *Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, C.A. 2, 1960, 274 F.2d 487, 489; *Arnstein* v. *Broadcast Music Co.*, C.A. 2, 1943, 137 F.2d 410; *Concord Fabrics, Inc.* v. *Marcus Bros. Textile Corp.*, C.A. 2, 1969, 409 F.2d 1315-16. Once you permit an expert witness to testify, to fit together component parts of the planes and make other demonstrations you completely destroy the objectivity of the jury. It is impossible to tell by observation whether you can fit one half of the fuselage of plaintiff's Thunderchief to the opposing half of the defendant's Thunderchief but ordinary observation does

reveal that the surface markings on the two fuselages are very different. From its verdict it is entirely apparent that the jury thought the demonstration of the similiarity of the dimensions of the opposing parts was more important than what they could observe.

Plaintiff's witness testified on cross examination that the Thunderchief kit had been first published in 1959 and only minor changes made in the cockpit area before it was republished in 1967. There is no testimony with reference to whether the 1959 plane was published with notice of copyright but there was no registration of this copyright if there was one. This information was wholly in the plaintiff's control. Inasmuch as this is a statutory cause of action and plaintiff must bring itself within the statute, the burden of proof then shifted to plaintiff to show the 1959 plane was published with notice of copyright. It made no effort to do so. *Freeman* v. *The Trade Register,* C.A. 9, 1909, 173 F. 419. *Mura* v. *Columbia Broadcasting System, Inc.,* D.C. N.Y. 1965, 245 F. Supp. 587.

Defendants further contend that, if the 1959 publication was with notice of copyright, there must be a registration of such copyright before plaintiff could sue as the 1966 registration would cover only the new parts of the plane. 17 U.S.C., Sec. 13. Otherwise the registration would serve to extend the duration or scope of the earlier copyright which is forbidden by Section 3 of the Act. The trial court refused to charge the jury to this effect and the Court of Appeals affirmed. (492 F.2d 1285).

In its opinion on the appeal following trial, the Court of Appeals did a complete turnabout and held ". . . it is neither the assembled plane, as a structure, nor the individual pieces of the unassembled plane, that are the proper subject for copyright protection. It is the scale model airplane kit, as a kit, that is copyrightable". Inas-

much as the only other parts of the kit are the instruction sheet, the container and the transparent plastic wrapper, the court is really saying these are the only copyrightable parts of the kit.

Quite obviously this change was made in the description of the copyrighted work for the purpose of upholding the plaintiff's contentions that it had a valid copyright because it had placed a notice of copyright on the container and instruction sheet; and no notice of copyright was required on any of the component parts of the plane. (492 F.2d 1281, 1284). In switching its position the Court of Appeals not only failed to achieve its obvious objective but completely destroyed the plaintiff's case for the following reasons: first, it affirmed defendant's consistent position that component parts of a plane are not the proper subject of copyright protection and these are the only parts of the work that plaintiff claimed defendant copied; second, plaintiff has no standing to maintain this action under Section 13 of the Copyright Act as registration is a condition precedent to suit and plaintiff never registered either a Thunderchief or a Skyraider kit; third, under the express provisions of Section 3 of the Act, copyright protection is limited to copyrightable components of the work copyrighted.

Had the Court of Appeals rendered a decision to the effect that neither the component parts of the plane nor the assembled plane were proper subjects for copyright protection in its first opinion there would have been no trial. Under it, all of plaintiff's evidence as to similarities between the component parts of plaintiff's and defendant's planes would have been irrelevant. The decision completely undercuts any basis for the allowance of damages or for injunctive relief requiring the surrender of molds, of finished products, and so forth. The court has no power

under the statute to interfere with the copying of unprotected works or to award damages for the alleged production and sale of such articles.

Both the trial court and the Court of Appeals departed from the accepted and usual course of judicial proceedings under the cases decided involving Rule 37, by defaulting defendants for an alleged failure to answer part of plaintiff's interrogatories.

When the question of the absence of the answers to interrogatories relating to damages first arose, defendant promptly informed the trial court that Judge Smith at the time he was assigned to the case had ruled that it was not necessary to answer such questions at that time and the plaintiff had never made any effort of any kind to obtain answers during the two years following reversal of the summary judgment by the Court of Appeals. (128a-135a). The plaintiff did not at any time contravene the representations of defendants with reference to the history of the interrogatories. The court record proves they never brought a motion to compel answers prior to trial. For that matter, plaintiff made no motion at trial—the court acting largely on its own motion.

For whatever reason, the Court of Appeals chose to ignore all facts favorable to the defendants in this situation. Therefore, with the petition for rehearing, defendants had the reporter go back over the arguments on motions, locate the ruling of Judge Smith and transcribe it. This ruling shows that the court was acting to eliminate the necessity of defendants filing formal objections. The Court of Appeals still failed to give any consideration to these facts, in effect; and affirmed its holding that "there can be no question as to Industro's liability under Rule 37(d) for its failure to answer interrogatories". 492 F.2d 1281, 1287. During the course of the trial, on Thursday Decem-

ber 21, 1972, the trial court issued a verbal order that the interrogatories be answered by Tuesday, December 26, 1972. Defendants pointed out that it would take approximately three weeks to get the information requested and that there was little likelihood that anyone would be spending their Christmas holiday assembling these figures in order to meet the deadline imposed by the court. The counsel for defendants requested that the court reduce its order to writing and refused to make any promises with reference either to obtaining service or obtaining the desired information within the time allotted. (132a-138a). With reference to this exchange the Court of Appeals did concede that, if pushed, it might find that under all the circumstances this order of the trial court was unreasonable. (492 F.2d 1281, 1287).

There is absolutely no case decided under F.R.C.P. 37 which finds any party guilty of contumacious conduct and subject to sanctions under the circumstances set forth here. The fact of the matter is that the trial court was using the provisions of Rule 37 to impose a penalty because the defendant did not voluntarily remain during the trial of the cause, probably having concluded that he could not find the defendant in contempt of court for failing to appear in view of the fact that he had not been subpoenaed except for the one day he appeared. Rule 37 was never meant to be used in this fashion.

Defendant's request that the court reduce its order to writing was in no way an idle quibble. On December 21 the court ordered that all the interrogatories be answered. Testimony introduced on December 26, in the absence of a jury over the objections of the defendant, supported defendant's position that it would be a matter involving substantial periods of time to answer the interrogatories. (174a-180a). It was not until several weeks

after the trial had concluded and on February 15, 1973 the court entered an order requiring the defendant to answer interrogatories and in that order defendant was required to answer only two of the six interrogatories. The answer was filed within the time allowed.

The language of Rule 37 and court decisions thereunder make it clear that an order must be entered before a party can be held to have failed or refused to answer it. *Wembly, Inc.* v. *Diplomat Tie Company*, D.C. Md. 1963, 216 F. Supp. 565, 573. *Application of Wisconsin Alumnae Research Foundation*, D.C. N.J. 1945, 4 F.R.D. 263. Inasmuch as Rule 37 governs pre-trial procedures, the basic question is whether the plaintiff waived its right to demand answers to its interrogatories by making no effort to obtain an order requiring answers until after trial. The irregularity of these proceedings is apparent.

The total disregard of defendant's rights by both the trial and appellate courts is further demonstrated by the award of an excessive amount of damages. The plaintiff proved neither its actual damages, although it stated it could do so (178a), nor defendants' profits. The only award possible then is one in lieu of actual damages which may not exceed $5,000. This court has passed on this issue:

> "In other words, the court's conception of what is just in a particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid but with the express qualification that in every case the assessment must be within the prescribed limits, that is to say, neither more than the maximum nor less than the minimum. Within these limits the court's discretion and sense of justice are controlling, but it has no discretion when proceeding

under this provision to go outside of them." *L. A. Westerman Co.* v. *Dispatch Co.*, 249 U.S. 100, 106-107, 39 S.Ct. 194, 63 L.Ed. 499 (1919).

The cases cited by the Court of Appeals in support of its affirmance of the award of $25,000 in lieu of actual damages and loss of profits do not sustain it. (492 F.2d 1288). In fact, in *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U.S. 228, 232-233, 73 S.Ct. 222, 97 L.Ed. 276 (1952), this court affirms its holding, in *Westerman, supra,* and confirms that statutory damages must come within the range provided by statute. The case of *Thomas Wilson & Son Co.* v. *Irving J. Dorfman Co.*, 433 F.2d 409, 414 (2d Cir. 1970), does not involve the question of the statutory range for in lieu damages but is concerned solely with the question of whether a copyright holder is entitled to both its damages and the infringer's profits. There is nothing in that case which has any applicability whatsoever to the instant cause.

To summarize: defendants have been deprived of due process of law by the actions of the district court and the Court of Appeals in refusing to submit to the jury proper questions of fact including but not limited to questions relating to the copyrightability of plaintiff's scale model airplanes and the components thereof; the adequacy of notice of copyright; what plaintiff intended to claim a copyright for in its registration of its Thunderchief, and the amount of damages to be awarded the plaintiff; also by the admission before the jury of the testimony of a so-called expert witness; by the confusing and conflicting determinations of what constitutes copyrightable subject matter as related to this case, by the Court of Appeals in its first and second opinions; by the Court of Appeals first holding that the question of the adequacy of the copyright notice is a question of fact in its first opinion and then holding, in its second opinion that this question is one of law;

if the question is one of law, by refusing to hold in its first opinion that the notices were inadequate; if the question is one of fact, by its failing to overrule the district court, in its second opinion, for having treated it as a legal question; by the inconsistency of the Court of Appeals in holding, in its second opinion, that neither the scale model airplane as a structure nor the component parts thereof are the proper subject of copyright on the one hand and then sustaining a judgment which requires the defendants to surrender the molds and equipment for the production of these uncopyrighted works to the plaintiff; by taking no account of the open hostility of the trial judge as reflected by the record, following a disagreement over the extent and effectiveness of plaintiff's subpoena, and sustaining a default of defendant on the issue of damages, ostensibly under Rule 37, when no order which could reasonably be obeyed had ever been issued by the court and no written order was entered until more than six weeks after the close of trial; by affirming an award of damages which is so excessive, and so far beyond the statutory maximum as to be unconscionably punitive. The defendants have been just as illegally deprived of their property as though it had been taken from them at gunpoint and they have no avenue of relief unless this court grants this petition for certiorari.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

OPINION ON MOTION FOR SUMMARY JUDGMENT

Proceedings had in the above-entitled cause before the Honorable TALBOT SMITH, District Judge, at Detroit, Michigan, on Monday, August 31, 1970.

* * *

[2] The Court: Well, I have had the benefit of exhaustive briefs in this matter, some of which you'll see on the desk here, along with photographs and models themselves, and I'll make a few general observations about it.

On the question of fact involved, I don't think there's any reasonable doubt. The fact is there's no doubt whatever in my mind that there has been a wholesale copying of the Plaintiff's structure. Not only is this clear from the interrogatories themselves, but it's clear from an examination of the parts submitted and the photographs.

Actually, in my judgment the defendants' models here, the defendants' models had as their origin, not the actual airplanes of the government, but the models of the Plaintiff.

I have noticed, as Miss Edwards has so ably pointed out, that there are certain differences, but the law is very clear in this area. In other words, you cannot avoid the burdens and onliness of substantial copying by making slight changes in detail.

It's perfectly obvious here to the Court that, as I say, there's been a wholesale, widespread copying, and if everybody in the industry is doing it, all I have to say [3] is it's time that more of them got to court; stop it.

On the matters of law involved here, the validity of the copyrights, similarly I don't find any real problem here. You've got a game in one situation. I think there is artistic merit under the cases in the reduction to useable form by a child in one of these enormous fighter or bomber airplanes.

I find nothing actually to attack the presumption of validity except argument, and the argument I don't agree with. I think there's plenty of basis here for the issuance of the copyright.

In short, I think the motion for summary judgment should be granted, and you may present the necessary order.

Mr. Heimbuch: Thank you, your Honor.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed November 23, 1970)

Upon reading plaintiff's motion for Summary Judgment and all of the briefs filed by the parties relating thereto and the other pleadings and exhibits filed in this case, and after hearing argument of counsel for plaintiff and defendants in open court on August 31, 1970, and the court being fully advised in the premises,

IT IS ORDERED, That plaintiff's Motion for Summary Judgment is hereby granted and the relief prayed for in plaintiff's complaint hereby granted, to wit, defendant Industro-Motive Corporation, their agents, servants and employees and all persons acting in concert with them or on their behalf be and are hereby enjoined permanently from infringing plaintiff's copyrights on its "F-105 Thun-

derchief" and "A-1 Skyraider" model airplane kits, including the production, manufacture and sale of said kits, and defendant Industro-Motive Corporation is hereby ordered to submit to plaintiff and the Court an account of gross sales from said kits, number of kits sold, gains, profits and advantages derived by their infringement of said copyrights within thirty days from the date hereof and, upon petition by plaintiff, defendant Industro-Motive Corporation will be required to pay such damage to plaintiff as this court shall award in accordance with rules of law relating to damages including reasonable attorneys fees and interest as directed by this court and at said time plaintiff shall be given an opportunity to prove defendant Henry C. Michael's involvement in said infringement and the Court shall decide whether or not he shall be personally liable for said damage.

ORDER

(Decided and Filed September 17, 1971)

Before: PECK, BROOKS and KENT, Circuit Judges.

BROOKS, Circuit Judge. This is an appeal by defendants-appellants, Industro Motive Corporation and Henry G. Michael, the corporation's president and major stockholder, from a judgment of the District Court holding that defendants infringed plaintiff-appellee's copyrights on two scale plastic model airplane kits. The District Court granted summary judgment for plaintiff, Monogram Models, Inc., permanently enjoining defendants from future infringing of plaintiff's copyrights. The question of damages and the personal liability of Henry Michael as president and major stockholder of defendant corporation were not resolved.

In granting summary judgment, the District Court drew certain legal and factual conclusions which it termed "general observations". First, the District Court held that plaintiff's plastic scale model airplanes were proper subject matter for copyright protection. Second, there was nothing "to attack the presumption of validity" of plaintiff's copyrights. Apparently, the Court was making reference to the statutory requisites for copyrightability, particularly the giving of proper notice of copyright on the model airplanes. Third, that defendant's model airplanes were wholesale copies of plaintiff's airplanes and the factual posture of the case made summary judgment appropriate.

On this appeal defendant has challenged each of these holdings claiming that plastic scale model airplanes are not copyrightable but, if copyrightable, plaintiff failed to give proper notice of copyright, 17 U.S.C. §§ 10, 19, and, therefore, loses any protection it might have had. And that there are genuine issues of material fact, including whether defendant's model airplanes were plagiarized from plaintiff, which removes the case from the category where granting summary judgment would be proper. Defendant also contends it was error for the District Court to have granted only partial summary judgment thereby leaving the question of damages and the liability of Henry Michael unresolved. For reasons hereafter stated, we affirm the District Court's legal conclusion as to the copyrightability of plastic scale model airplanes, but reverse and remand for trial and resolution of certain factual disputes and questions.

Our disposition of this case reflects the fact that on the present record it is not possible to review any other question but the legal one respecting the copyrightability of scale plastic model airplanes. As regards the propriety of the grant of summary judgment, we hold this case

has raised several genuine issues of material fact thereby making summary handling of the matter under Rule 56 Federal Rules of Civil Procedure impossible. Specifically, there appear to be conflicts raised over the infringement question by the opposing affidavits for summary judgment. See generally, *Blumcraft of Pittsburgh* v. *Newman Brothers, Inc.*, 373 F.2d 905 (6th Cir. 1967). In considering the motions for summary judgment, the District Court had before it the pleadings, two sets of interrogatories, three affidavits and the airplane models. In one set of interrogatories, defendant had responded affirmatively to the general question whether it copied any component of either of plaintiff's models. Yet, in defendant's affidavit specific similarities between each company's models, which plaintiff claimed to be proof of plagiarism, were explained as technical or standard trade methods commonly used by all manufacturers of plastic model airplanes. While there was a general admission of copying, the fact that scale models were of the same actual airplanes and that similarities were explained in terms of common industrial practices tends to raise a genuine issue of fact as to whether the similarities were simple resemblances, being a natural by-product of the expression of identical ideas, or copyright infringement. *Sunset House Distributing Corporation* v. *Doran*, 304 F.2d 251, 252 (9th Cir. 1962); *Alfred Bell and Company, Ltd.* v. *Catalda Fine Arts, Inc.*, 191 F.2d 99, 103 (2nd Cir. 1951); *Ricker* v. *General Electric Company*, 162 F.2d 141, 142 (2nd Cir. 1947).

Moreover, there appear to be other important factual disputes, such as the sufficiency of copyright notice and the extent of the subject matter protected by the copyright certificate, which were not specifically addressed but require development and resolution by the District Court. While it is recognized that once a copyright certificate

is issued it is prima facie evidence of the facts stated therein, 17 U.S.C. § 209, Nimmer on Copyrights §§ 139.1, 139.2, and that initial publication was with sufficient copyright notice, *Tennessee Fabricating Company* v. *Moultrie Manufacturing Company*, 421 F.2d 279 (5th Cir. 1970), the presumption is clearly rebuttable, *Rohauer* v. *Friedman*, 306 F.2d 933 (9th Cir. 1962); *Jerry Vogel Music Company* v. *Forster Music Publisher*, 147 F.2d 614, 615 (2nd Cir. 1945). Since the burden of going forward shifts to the defendant following proof of issuance of the copyright, *Blumcraft of Pittsburgh* v. *Newman Brothers, Inc.*, *supra* at 907; *Rohauer* v. *Friedman*, *supra* at 935, and as in this case there exists on the face of a copyright certificate ambiguity as to the extent of the subject matter protected,[1] as well as a specific affirmative attack on a copyright for lack of adequate notice, a defendant should be permitted the opportunity to introduce supporting evidence to satisfy the burden of going forward. Accordingly, we reverse and remand this action to the District Court for consideration and trial on the factual questions presented, among which are:

1. Did the registration for copyright filed by plaintiff and the copyright certificate cover the actual plastic model airplane and not simply the instruction sheet for assembly and the decorative container packaging the plastic pieces of the model airplane?

2. Was there sufficient and adequate legal notice of copyright on all the subject matter (instruction sheets, containers and plastic models) for which plaintiff seeks copyright protection?

3. Was there ever a period during which the alleged copyrighted subject matter was manufactured without

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1. See note 3 *infra*.

copyright notice,[2] and if so was there an abandonment to the public domain?

4. If valid, were plaintiff's copyrights infringed by defendants' models?

Resolving whether scale plastic model airplanes are proper subject matter for copyright protection presents a unique problem in statutory construction. Section 4 of the Copyright Act (17 U.S.C. § 4) provides: "The works for which copyright may be secured under this title shall include all the writings of an author." Then section 5 ("Classification of works for registration") provides:

> The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:
>
> (a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations.
>
> (b) Periodicals, including newspapers.
>
> (c) Lectures, sermons, addresses (prepared for oral delivery).
>
> (d) Dramatic or dramatico-musical compositions.
>
> (e) Musical compositions.
>
> (f) Maps.
>
> (g) Works of art; models or designs for works of art.
>
> (h) Reproductions of a work of art.

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2. A basis for this question arises because it appears from the record that over two years elapsed between the first public sales of the model airplanes and filing for copyright protection.

(i) Drawings or plastic works of a scientific or technical character.

(j) Photographs.

(k) Prints and pictorial illustrations including prints or labels used for articles of merchandise.

(l) Motion-picture photoplays.

(m) Motion pictures other than photoplays.

The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title, nor shall any error in classification invalidate or impair the copyright protection secured under this title.

Plaintiff's two plastic model airplanes are called F-105 Thunderchief and A1-E Skyraider. The F-105 Thunderchief is registered in class (a) (Books, etc.) and the A1-E Skyraider is registered in class (g) (Works of Art, etc.).[3] The fact that these classifications are perhaps not accurate descriptions of the subject matter sought to be copyrighted apparently is of no consequence. 17 U.S.C. § 5; see also, *Day-Brite Lighting, Inc.* v. *Sta-Brite Fluorescent Manufacturing Company*, 308 F.2d 377 (5th Cir. 1962); *Peter Pan Fabrics, Inc.* v. *Dan River Mills, Inc.*, 415 F.2d 1007 (2nd Cir. 1969); *Bouvé* v. *Twentieth Century Fox Film Corporation*, 122 F.2d 51 (D.C. Cir. 1941). It is a legitimate question as to how certain of the classifications, such as photographs, motion pictures and "Works of art; models or designs for works of art" can be recon-

3. The Certificate of Registration for the Thunderchief listed under the section for "Title" "F-105 THUNDERCHIEF, being a container and instruction sheet for the assembly of a scale model airplane and components thereof." The Certificate for the Skyraider listed under the section for "Title" "A1-E Skyraider" and under the "Nature of Work" section "Scale Model Airplane."

ciled as "writings of an author."[4] However, courts have held, either by assuming sub silentio or through the use of a legal fiction, that the phrase "writings of an author" is not to be literally construed so as to restrict the scope of copyrightable subject matter. Thus, there has been upheld copyright protection on "writings of an author" as far removed from a literal definition of "writings" and "author" as miniature statues of certain religious shrines, *Allegrini* v. *DeAngelis*, 59 F.Supp. 248 (E.D.Pa. 1944), *aff'd.* 149 F.2d 815 (3rd Cir. 1945); miniature reproduction of Robins' "Hand of God", *Alva Studios, Inc.* v. *Winninger*, 177 F.Supp. 265 (S.D. N.Y. 1959); a doll called Zippy in the form of a chimpanzee which appeared on the old Howdy Doody television program, *Rushton* v. *Vitale*, 218 F.2d 434 (2nd Cir. 1955); a filigreed room divider, *Tennessee Fabricating Company* v. *Moultrie Manufacturing Company*, 421 F.2d 279 (5th Cir. 1970); costume jewelry, *Boucher* v. *DuBoyes*, 253 F.2d 948 (2nd Cir. 1958); plastic Boxer and Cocker Spaniel dogs used as coin banks, *Royalty Designs, Inc.* v. *Thriftichеck Service Corporation*, 204 F. Supp. 702 (S.D.N.Y. 1962); red flat plastic bags with decoration and faces which when stuffed with crumpled newspapers become "fat life-sized dummy Santa Claus", *Sunset House Distributing Corporation* v. *Doran*, 304 F.2d 251 (9th Cir. 1962); a model hobby horse, *Blazon, Inc.* v. *Deluxe Game Corporation*, 268 F.Supp. 416 (S.D.N.Y. 1965); a sculptured artificial lilac flower made of polyethylene, *Prestige Floral, Societe Anonyme* v. *California Artificial Flower Company*, 201 F.Supp. 287 (S.D.N.Y. 1962) and

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4. Since this appeal does not raise a constitutional challenge we only allude to the fact that there has been some probative concern expressed that the grant of Congressional power provided in Article I, § 8 of the Constitution is perhaps not as broad as has been exercised in the Copyright Act. See Mr. Justice Douglas' opinion in *Mazer* v. *Stein*, 347 U.S. 201 (1953) at 219 and note 5 of Mr. Justice Reed's majority opinion in *Mazer* v. *Stein* at 206-208.

the list goes on and on. From these and other cases it can be observed that "practically anything novel can be copyrighted", *Dan Kasoff, Inc.* v. *Novelty Jewelry Company*, 309 F.2d 745, 746 (2nd Cir. 1962) so long as it is "original". *Mazer* v. *Stein*, 347 U.S. 201, 214 (1953). In short, we feel compelled to affirm the holding that scale plastic model airplanes are proper subject matter for copyright protection.

The judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this opinion.

ORDER

(Filed August 21, 1972)

Defendants by motion having raised the issue of whether as a matter of law, scale model airplane kits are copyrightable, and the Court having heard the argument of counsel for all parties, having read the briefs filed, having reviewed the decision in this case of the United States Court of Appeals for the Sixth Circuit, and being fully advised in the premises,

IT IS ORDERED, that scale model airplane kits are copyrightable.

MEMORANDUM OPINION AND ORDER

(Filed November 30, 1972)

The parties have not been able to agree as to whether this cause should be tried by the court or by a jury. Because of the lack of agreement the court must resolve the dispute for the parties.

The relief sought by the plaintiff is primarily equitable, but the prayer for damages is legal. And of course a finding of an actual infringement is necessary before any relief, whether equitable or legal, can be granted.

Dairy Queen, Inc. v. *Wood*, 369 U.S. 469 (1962), is the law which must be followed in cases which present a prayer for both legal and equitable relief. A party has a right to a jury trial on the legal issues. This is true even when, as here, the legal portion of the case is far outweighed by the equitable portion of the case.

At the trial of this cause a jury will be sworn to determine whether or not there has been an infringement, and if there has been an infringement, the jury will determine the amount of damages, if any. The jury will also determine any other legal issues the parties call to the court's attention prior to the trial.

The court will resolve all equitable issues, remembering that findings of fact by the jury are res judicata, and finding whatever facts remain necessary to a resolution of the equitable issues.

So ordered.

MEMORANDUM OPINION AND ORDER

(Filed December 19, 1972)

The plaintiff, a manufacturer of scale plastic model airplane kits, has brought this action against the defendants alleging that they have infringed the plaintiff's copyright on their scale model kits and asking that the defendant be permanently enjoined from future infringement of plaintiff's copyright and for damages. The Court of Appeals reversed an order of this court granting summary

judgment in favor of the plaintiff. The Court of Appeals in that opinion upheld the copyrightability of plastic scale model airplanes but held that there were certain factual issues that could not be resolved by summary judgment.

The parties have agreed as to facts relating to two of the questions remanded to this court by the Court of Appeals:

1. Did the registration for copyright filed by plaintiff and the copyright certificate cover the actual plastic model airplane and not simply the instruction sheet for assembly and the decorative container packaging the plastic pieces of the model airplane?
2. Was there sufficient and adequate legal notice of copyright on all the subject matter (instruction sheets, containers and plastic models) for which plaintiff seeks copyright protection?

Two models are in issue, an F105 Thunderchief and an A1E Skyraider. In substance, the issue as to each model is did the plaintiff secure and protect as provided by law a valid copyright of the scale model?

F105 THUNDERCHIEF KIT

The record shows that the plaintiff deposited two copies of the work entitled "F105 Thunderchief" and an application for registration of a claimed copyright (Form A) in the copyright office on July 22, 1968, and that the claimed copyright was subsequently registered under Registration Number A-8254. The work deposited consisted of a container box, a printed instruction sheet bearing the identification words "F105 Thunderchief" and "Kit 149-150" and unassembled plastic model parts with decal. The application states the title of the work as "F105 Thunderchief, being a container and instruction sheet for the

assembly of a scale model airplane and component parts thereof." The deposit was made in the copyright office pursuant to Section 5(a) of Title 17, United States Code, "Books, including composite and cyclopedic works, directories, gazetteers and other compilations." The copyright was protected by the appropriate copyright symbol appearing on the container box and on the instruction sheet.

The court holds that the copyright was secured as to the scale model parts, as well as to the box and instruction sheet, and that it was properly protected by the copyright notice that appears on the face of the container box and the instruction sheet.

It is contended by the defendant that the words used in the application to describe the matters copyrighted do not include the component parts of the kit. Defendant asserts that they cover only the instruction sheet for the assembly of the parts and the box. A fair reading of the words indicates that they should be read as follows, that it was clearly the intention of the plaintiff to copyright the component parts as well, and that a reasonable person would be on notice that the parts were copyrighted:

> "[1] a container and [2] instruction sheet for the assembly of a scale model airplane and [3] component parts thereof."

Cases such as *Letter Edged in Black Press* v. *Public Building Commission*, 320 F. Supp. 1303 (D.C. Ill. 1970), *Gardenia Flowers* v. *Markowitz*, 280 F. Supp. 776 (D.C. N.Y. 1968), *Ross Products* v. *New York Merchandise*, 233 F. Supp. 260 (D.C. N.Y. 1964), hold that notice of copyright placed on labels and containers that are intended to be discarded are not sufficient notice to protect a copyright. However in this case the copyright is intended to cover a kit for the assembly of model planes and the com-

ponent parts thereof. The value of the kit comes from the joy of assembling the plane. Both the box intended to hold the parts of the assembled plane and the sheet of instructions are very much a permanent part of the kit for the assembly of the plane, and notice on these items is sufficient to protect the copyright. *Uneeda Doll* v. *Goldfarb*, 373 F.2d 851 (2nd Cir. 1967).

This interpretation is supported by copyright office Circular 17 providing that notice of copyright of games or puzzles may be placed on the game rules, the game board or on the label. A kit for the assembly of a model plane is much like a game or puzzle. The various parts, how they fit together, the process of assembly, is what is copyrighted here, not the completed model.

A1E SKYRAIDER KIT

The A1E Skyraider kit was copyrighted under Subsection G of 17 U.S.C.A. Section 5: "Works of art; models and designs for works of art." The copyright notice, in addition to being placed on the box and the instruction sheet, is placed on one side of a wing piece. Before assembly the notice is visible to anyone examing the piece. After assembly the notice is inside the wing and not visible.

Defendant makes much of the fact that notice of copyright is not visible on the plane when the plane is assembled. This assumes that the copyright is intended to cover the assembled plane. As indicated with the Thunderchief the copyright covers the component parts and their assembly process as explained in the instruction sheet. The notice is visible to anyone involved in the process of assembly.

If this is so, the defendant suggests that the copyright registration is entered under the wrong section, Section

G being reserved for completed works of art or full models and designs for such works of art. The law is clear that it makes no difference under which section the copyright is claimed. The Court of Appeals in this case, 448 F.2d 284 (1971), so held when it said: "The fact that these classifications are perhaps not accurate descriptions of the subject matter sought to be copyrighted apparently is of no consequence." This court therefore holds that copyright was secured on the Skyraider and was properly protected.

So ordered.

JUDGMENT

(Filed March 6, 1973)

This action having come on for trial before the Court and a jury, Honorable Charles W. Joiner, District Judge, presiding, and the jury having rendered its verdict on December 27, 1972, that the defendants infringed plaintiff's copyright on its A-1E Skyraider ready-to-assemble scale model kit and plaintiff's copyright on its F-105 Thunderchief ready-to-assemble scale model kit, and

The Court having defaulted defendants on the issue of damages for failure to respond to the order of this Court during trial to provide information pertinent to damages validly requested by plaintiff, and

The Court thereby having the obligation to make a determination of damages, and

Defendant having on February 26, 1973, by answer to interrogatories, admitted that it sold 114,120 kits of its A-1H Skyraider and 113,100 kits of its F-105D Thunderchief, which the jury in each instance found infringed the copyright of the plaintiff, and

It appearing to the Court that most, if not all, of said infringing kits were made subsequent to the time of publication by plaintiff with notice of copyright, and

It appearing to the Court it is just in this case, in lieu of actual damages and profits, to award plaintiff damages of $25,000.00, and

It appearing to the Court that plaintiff is entitled a reasonable attorney's fee of $20,644.81,

IT IS ORDERED AND ADJUDGED that plaintiff recover of defendants, jointly and severally, the sum of $45,644.81, with interest thereon from the date hereof.

IT IS FURTHER ORDERED AND ADJUDGED that defendants, their agents, servants, and employees, and all persons acting in concert with them or on their behalf, be enjoined permanently from infringing said copyrights of plaintiff in any manner, and from publishing, selling, marketing, or otherwise disposing of any copies of plaintiff's copyrighted ready-to-assemble model airplanes identified as A-1H Skyraider and F-105D Thunderchief, and any components thereof, and any model planes constructed therefrom.

IT IS FURTHER ORDERED AND ADJUDGED that defendants be required to deliver all copies of said ready-to-assemble model airplane kits entitled A-1H Skyraider and F-105D Thunderchief, all components thereof, and all model airplanes constructed therefrom, in their possession or under their control, including copies which have been distributed to their dealers, and to deliver up for destruction all infringing copies and all molds, dies, and other matter for making such infringing copies.

Plaintiff may tax its costs.

ORDER

(Filed March 6, 1973)

Before: PECK, McCREE and KENT, Circuit Judges.

This matter having come on to be considered on the motion of the petitioners to stay further proceedings in the cause of *Monogram Models, Inc.* v. *Industro Motive Corporation, et al.*, being Civil Action No. 32089 in the United States District Court for the Eastern District of Michigan, Southern Division, pending the hearing of their motion for relief in the nature of mandamus and prohibition, and the Court being fully advised in the premises having concluded that said motion is not well taken,

IT IS ORDERED that petitioners' Motion for Stay of Proceedings be and it hereby is denied.

ORDER

(Filed April 20, 1973)

Before: PECK, McCREE and KENT, Circuit Judges.

This matter is before the Court on a petition for a writ of mandamus and a writ of prohibition. By this petition the following relief is sought:

> "1. That the district court be ordered to set aside its judgment of March 6, 1973, and be prohibited from entering any other judgment which contains an award of damages to Monogram Models, Inc., until this case has been heard on appeal.
>
> "2. The issuance of a writ of prohibition directing the district court not to issue any process in aid of enforcement of the judgment entered on March 6, 1973, insofar as damages are concerned."

The record reveals that in mid-December, 1972, the principal cause from which arises this proceeding was brought on for trial in the United States District Court. On December 27, at the conclusion of the proofs the District Judge announced that he was finding the defendant in default for failure to answer certain interrogatories; that only the issue of the infringement of the copyrights would be submitted to the jury, that the issue of damages would be considered by the court after the interrogatories had been answered. He, thereupon, ordered the interrogatories answered by February 1, 1973. The answer to the interrogatories not having been filed on February 15, 1973, a formal order was entered requiring answers to the interrogatories in question and setting the matter for hearing on the issue of damages before the court without a jury on March 6, 1973.

On March 5, 1973, there was filed in this Court a motion for mandamus and prohibition and for a stay of proceedings. On March 6, 1973, this Court entered an order denying the stay of proceedings and on the same day the district judge entered a judgment for damages. On March 26, 1973, petitioner filed a supplement to the motion for relief in the nature of a mandamus and prohibition and asked the relief outlined above. On April 4, 1973, a notice of appeal from the judgment of March 6 was filed.

After due consideration of the entire file the Court concludes that these proceedings in the nature of an application for the extraordinary writs are an effort to avoid the requirements of Rule 8, Rules of Appellate Procedure, 28 U.S.C. It is axiomatic that applications for writ of mandamus or prohibition may not be used as a substitute for appeal. All issues presented in this case may be more properly considered on appeal.

IT IS ORDERED that the petition for writ of mandamus and prohibition be denied.

IT IS FURTHER ORDERED that the briefs presently on file, together with any supplemental briefs which may be filed by either party may be considered as having been filed with the appeal from the judgment.

ORDER

Decided and Filed March 12, 1974.

Before WEICK and MILLER, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

WEICK, Circuit Judge. This is an appeal from a judgment of the District Court finding that appellants infringed appellee's copyrights on its scale model airplane kits, and awarding damages and injunctive relief. The issue of infringement was determined by a jury.

Monogram Models, Inc. (Monogram) sued Industro Motive Corporation and its president, Henry G. Michael (hereinafter both defendants will be referred to as "Industro"), charging Industro with infringing copyrights held by Monogram on its F-105 Thunderchief kit which was registered with the Copyright Office on July 22, 1968, in Class "A", Registration No. A8254, and on its A1-E Skyraider kit which was registered on July 19, 1968, in Class "G", Registration No. Gp 59925.

The District Court granted Monogram's motion for summary judgment, and Industro appealed to this Court. We held that the District Court was correct in its decision that the plastic sale model airplane kits were the proper subject matter for copyright protection, but reversed for error in entering summary judgment, and we remanded

for "trial and resolution of certain factual disputes and questions." *Monogram Models, Inc.* v. *Industro Motive Corp.*, 448 F.2d 284 (6th Cir. 1971).

We delineated four questions to be among the issues to be resolved at trial:

> 1—Did the registration for copyright filed by plaintiff and the copyright certificate cover the actual plastic model airplane and not simply the instruction sheet for assembly and the decorative container packaging the plastic pieces of the model airplane?
>
> 2—Was there sufficient and adequate legal notice of copyright on all the subject matter (instruction sheets, containers and plastic models) for which plaintiff seeks copyright protection?
>
> 3—Was there ever a period during which the alleged copyrighted subject matter was manufactured without copyright notice, and if so was there an abandonment to the public domain?
>
> 4—If valid, were plaintiff's copyrights infringed by defendants' models?

On remand the parties stipulated the facts relating to the first two questions. The District Court held that the copyrights were effective as to the plastic scale model parts, as well as to the container boxes and instruction sheets for each of Monogram's kits. The District Court further held that the copyrights on the two kits were properly protected by the copyright notices that appeared on the container boxes and instruction sheets of each kit. (As to one kit, the A1-E Skyraider kit, there was also a notice on the inside of one wing part.)

The issue of infringement was submitted to a jury which rendered a verdict that Industro had infringed

Monogram's copyrights on its two scale model airplane kits. The District Court defaulted Industro on the issue of damages because of Industro's failure to respond to an order of the Court to provide information pertinent to damages requested by Monogram in interrogatories duly submitted to Industro. The District Court then determined damages on the basis of available information, and rendered judgment against Industro in the amount of $45,644.81, which judgment included $25,000 assessed in lieu of actual damages, and $20,644.81 for reasonable attorney's fees.

The District Court issued a permanent injunction against further infringement and required deliverance by Industro to Monogram of all infringing kits on hand, including molds, dies, and other matter for making infringing copies. Industro appealed, asserting five issues for review by this Court. We affirm.

The action arose under the copyright laws of the United States, Title 17 U.S.C. § 1, *et seq.*, and jurisdiction was predicated on Title 28 U.S.C. § 1338.

Monogram and Industro are competitors, engaged in the production, manufacture and sale of scale model airplane kits.

Monogram contended that the copyright on its F-105 Thunderchief kit, registered with the Copyright Office on July 22, 1968 under Class A, was infringed by Industro's production and sale of Industro's F-105D Thunderchief kit; and Monogram further contended that the copyright on its A1-E Skyraider kit, registered with the Copyright Office on July 19, 1968 under Class G, was infringed by Industro's production and sale of Industro's A-1 H Skyraider kit.

It was uncontroverted that Industro had access to, had seen, and had examined Monogram's two kits before designing and producing its own kits. Industro even admitted to some copying, but contended that the copying was not substantial and that the judgment of infringement cannot be sustained for several reasons.

Industro first asserts that Monogram does not have valid copyrights on its Thunderchief and Skyraider kits. The basis for this assertion is predicated on three arguments: First, that Congress has no power to provide for copyrighting of anything other than "an author's writing"; Second, that scale model airplane kits cannot be included in any classification of articles which may be protected by copyright under 17 U.S.C. § 1, *et seq.*, and therefore they are not copyrightable; and Third, that Monogram failed to meet the statutory and regulatory requirments for notice of copyrights on either kit.

In the earlier appeal in this action we held that Congress has the power to provide for copyrights on things not *strictly* termed "author's writing," and that the term should be given a broad construction. 448 F.2d 284 at 287. We have found no reason to depart from that holding now.

We further held that "the copyrightability of scale plastic model airplanes" was a legal question, and then we went on to determine that "scale plastic model airplanes are proper subject matter for copyright protection." 448 F.2d at 285, 288.

In speaking of scale plastic model airplanes this Court was referring to scale model airplane *kits* as the proper subject for copyright protection. It is the originality in the expression and embodiment of the design and structure of the kit that satisfies the originality requirement of copyrightability as stated in *Mazer* v. *Stein*, 347 U.S. 201, 214

(1953). Thus it is neither the assembled plane, as a structure, nor the individual pieces of the unassembled plane, that are the proper subject for copyright protection. It is the scale model airplane kit, as a kit, that is copyrightable.

As to the question of what is the proper classification of the scale model kits under 17 U.S.C. § 5, we previously noted:

> The fact that these classifications are perhaps not accurate descriptions of the subject matter sought to be copyrighted apparently is of no consequence. (448 F.2d at 287)

See also 17 U.S.C. § 5; *Day-Brite Lighting, Inc.* v. *Sta-Brite Fluorescent Mfg. Co.*, 308 F.2d 377 (5th Cir. 1962).

Industro further contended that Monogram's copyrights on the two kits were invalid because Monogram failed to meet the statutory and regulatory requirements for notice of copyright for both kits. Notice of Monogram's copyright was placed on the boxes containing the pieces of the plane and on the instruction sheets of the kits for both the Thunderchief and Skyraider kits of Monogram. As to the Skyraider kit, notice was also placed on the inside of a wing part, but after the model plane is assembled this notice is not visible.

The basic requirement as to the placement of a copyright notice is stated in 17 U.S.C. § 10:

> § 10 Publication of work with notice
>
> Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States

> by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 22 of this title.

As we have just previously noted, the "work" with which this cause is concerned is scale model airplane kits. In order to comply with Section 10 there must be publication with notice of the copyright, and such notice "shall be affixed to each copy thereof published or offered for sale . . . ." For both of Monogram's kits, the A1-E Skyraider and the F-105 Thunderchief, there was publication of the work with notice of the copyright affixed to the container boxes and the instruction sheets of the kits. In our opinion such publication and notice comply with Section 10.

The form of the copyright notice is delineated in 17 U.S.C. § 19. The copyright notice on the container boxes and instruction sheets for both of Monogram's models complies with the form required in Section 19. Because the instruction sheets and the container boxes are integral parts of the model airplane kits and the notice on these parts complies with the necessary form for notice of copyright, the notices of copyright on the two kits were adequate.

> The purpose of a copyright notice is to prevent innocent persons who are unaware of the existence of the copyright from incurring the penalties of infringers by making use of the copyrighted work. (*Uneeda Doll Co.* v. *Goldfarb Novelty Co.*, 373 F.2d 851, 852 (2d Cir. 1967)).

The notices provided on the kits were certainly adequate to give notice to anyone who reasonably used the kits; it is not necessary to place a notice on each of the plastic airplane parts themselves.

In our opinion Monogram has a valid copyright on its A1-E Skyraider and F-105 Thunderchief scale model airplane kits.

Industro has contended that the District Court erred in denying Industro's motion to dismiss as to the F-105 Thunderchief, or in the alternative, in refusing to give to the jury Industro's requested instructions as to this kit.

The basis for the motion to dismiss and the requested instructions was the fact that Monogram's witness, Roger Harney, who was director of engineering of Monogram's model shop, testified that Monogram produced a Thunderchief kit as early as 1959. Monogram's F-105 Thunderchief kit, which is the subject of this litigation, was registered with the Copyright Office in 1968, and the certificate of registration stated the date of publication to be March 2, 1967. The year-date in the notice of copyright printed on the container box and instruction sheet was 1966.

From this testimony concering a Thunderchief kit produced by Monogram in 1959, and from the evidence that Monogram's F-105 Thunderchief kit of this action was not registered until 1968, Industro asserts that either the 1959 Thunderchief produced by Monogram was published without notice and the work was abandoned to the public domain and therefore not copyrightable at a later date, or that the F-105 Thunderchief kit produced in 1967 was only a modification of the 1959 model, and therefore the copyright obtained on the kit published in 1967 was valid only as to the differences between the "1959 Thunderchief kit" and the "1967 F-105 Thunderchief kit."

There is no evidence in the record that the Thunderchief kit produced by Monogram in 1959 was published without notice. There is no validity in Industro's claim

that the Thunderchief kit was abandoned to the public domain in 1959 and therefore not copyrightable at a later date.

As to Industro's alternative argument that the copyright on the F-105 Thunderchief kit published in 1967 was only for the differences between the "1959 Thunderchief kit" and the "1967 Thunderchief kit," the District Court was correct in rejecting this assertion.

We have held that the copyright secured by Monogram on the F-105 Thunderchief kit, published in 1967, was a copyright on the *kit*, and is valid as to all components of the kit, including the plastic component parts.

Title 17 U.S.C. § 3 provides:

> The copyright provided by this title shall protect all copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting, but without extending the duration or scope of such copyright.

The record indicates that Monogram deposited with the Copyright Office two copies of the F-105 Thunderchief kit, and also filed with the Copyright Office a certificate of registration for the F-105 Thunderchief kit. Having done this Monogram complied with Section 13 of Title 17 requiring such action before commencement of a suit for infringement. See 17 U.S.C. § 13.

Neither the motion to dismiss nor the requested instructions as to this matter were proper, and the District Court, in denying the motion and refusing the requested instructions, was correct.

Industro next asserts that it was error for the District Court to refuse to require Monogram to specify in which of the classifications of works for registration its scale

model airplane kits belong. Industro cites 17 U.S.C. § 5 as the authority for this requirement, which section provides:

> § 5 Classification of works for registration
>
> The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs. . . .

Several classifications are then listed. Monogram's F-105 Thunderchief kit was registered in class—

> "(a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations."

Monogram's A1-E Skyraider kit was registered in class—

> "(g) Works of art; models or designs for works of art."

Monogram's applications for registration specified these classes, and the kits were registered in these respective classes. This is all that the first sentence of Section 5 requires. This Section also provides:

> . . . [N]or shall any error in classification invalidate or impair the copyright protection secured under this title.

As previously stated herein and as this Court noted in the first appeal,—

> The fact that these classifications are perhaps not accurate descriptions of the subject matter sought to be copyrighted apparently is of no consequence. (448 F.2d at 287).

Industro further claimed error on the part of the District Court in the admission of testimony by Monogram's

witness, Roger Harney, as to similarities between Monogram's kits and Industro's kits. Mr. Harney, director of engineering in Monogram's model shop, was called as a witness and gave testimony as to the creation and production of Monogram's scale model kits. He also testified over the objections of Industro as to similarities between Monogram's kits and Industro's kits. Industro objected to this testimony, contending that it invaded the province of the jury's function. We disagree. We find no error in permitting such testimony. The witness, by pointing out to the jury the similarities between the copyrighted and the infringing kits, did not usurp the functions of the jury as the jury, itself, could and did make comparisons.

The question of infringement was dependent upon "whether the ordinary reasonable person would fail to differentiate between the two works." *Williams* v. *Kaag Mfg. Co.*, 338 F2d. 949 (9th Cir. 1964).

The jury was instructed by the Court as to the proper test to be applied, and was also instructed that if its observations were at variance with the testimony of any witness, the jury was to rely upon its own observations.

Industro's final claims of error are that the Court should not have granted injunctive relief against it and should not have defaulted Industro on the issue of damages.

The jury having found that Industro infringed Monogram's copyrights, Industro is subject to the remedy provisions of *Copyrights*, 17 U.S.C. §101. Under §101(a) Industro is subject to an injunction restraining it from further infringement, and under § 101(d) Industro may be required to deliver up all infringing copies and all means for making such infringing copies.

Section 101(b) provides as follows:

> If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:
>
> . . .
>
> (b) . . . To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, . . . or in lieu of actual damages and profits, such damages as to the Court shall appear to be just, ...

During the trial the District Court defaulted Industro on the issue of damages because of Industro's failure to comply with the order of the Court to answer certain interrogatories concerning damages. The interrogatories were duly submitted to Industro by Monogram prior to trial.

Industro has asserted that the question of damages is for the jury to decide, *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962), and in addition, that Monogram failed in its burden of proof as to damages. Industro argues that it was error for the District Court to take the issue of damages from the jury, and for the Court to assess damages without Monogram's having proved actual damages.

Monogram filed its complaint in this action on December 11, 1968; Industro filed its answer on February 3, 1969. On April 2, 1969 Monogram filed its first set of interrogatories to Industro. Included in that set of interrogatories were six interrogatories inquiring as to the total number of Thunderchief and Skyraider kits manufactured

and sold by Industro, and the amount in dollars from sales of each of Industro's kits.

Industro's answers to this first set of interrogatories were silent as to these six interrogatories. Industro neither objected to, nor answered, any of these six interrogatories. During the trial the Court ordered Industro to answer within five days the six then-unanswered interrogatories. (The five days included a weekend and Christmas Day.) When Industro failed to answer the interrogatories within five days the Court defaulted Industro on the issue of damages and ordered that two of the six interrogatories (relating to the total number of kits for each model manufactured or sold) be answered within approximately two months. Industro answered two of the interrogatories relating to the total number of kits sold for both the Skyraider and Thunderchief kits; but it did not answer the interrogatories inquiring as to the amount in dollars received from the sale of each kit.

On the basis of the information given, the Court assessed damages in lieu of actual damages, and also allowed to Monogram reasonable attorney's fees.

By its failure to answer the interrogatories submitted to it and its failure to comply with the Court's order, Industro was subject to sanctions under Rule 37(d) or 37(b) of the Federal Rules of Civil Procedure. Even if there were any question as to the reasonableness of applying sanctions for Industro's failure to answer the Court's order within five days, there can be no question as to Industro's liability under Rule 37(d) for its failure to answer the interrogatories.

Fed.R.Civ.P. 37(d) provides:

> If a party . . . fails . . . to serve answers or objections to interrogatories submitted under Rule 33,

> after proper service of the interrogatories . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b) (2) of this rule . . . .

Rule 37(d) clearly places on the party receiving interrogatories the burden either to answer them or to state his objections. He may not remain silent and then assert that he has no duty to answer until ordered by the Court to do so. If a party feels that interrogatories are objectionable he must either state his objections thereto or seek a protective order under Rule 26(c). *See* Notes of Advisory Committee on Rules, Rule 37, 28 U.S.C.A. (1973 Supp.) pp. 43, 44.

The District Court, upon Industro's failure to answer the interrogatories, and upon Industro's failure to comply with the Court's order to answer the interrogatories, "may make such orders in regard to the failure as are just, and among other orders possible under paragraph (C) of Rule 37(b)(2) the Court may render "a judgment by default against the disobedient party." Fed.R.Civ.P., 37(b)(2).

Industro cannot prevent Monogram from ascertaining the facts with regard to damages by remaining silent and failing to answer interrogatories duly submitted to it, and then assert that it has been denied due process when sanctions for such refusal to answer are imposed as outlined in the Federal Rules of Civil Procedure. The District Court did not err in defaulting Industro on the issue of damages.

In assessing damages the District Court awarded $25,000, in lieu of actual damages and profits. This is

consistent with Section 101(b) of the Copyright Law, and is within the Court's discretion. *See* 17 U.S.C. § 101(b). *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U.S. 228 (1952); *Thomas Wilson & Co.* v. *Irving J. Dorfman Co.*, 433 F.2d 409, 414 (2d Cir. 1970).

Similarly, the District Court's award of $20,644.81 as a reasonable attorney's fee, is consistent with Section 116 of the Copyright Law, and is within the Court's discretion. See 17 U.S.C. § 116.

Having considered all of the issues presented in this appeal, we find no error in the proceedings below requiring a different disposition of this cause. We affirm the District Court's judgment.

Monogram has applied to us for allowance of additional attorney's fees and expenses in the amount of $13,389.91. Monogram was allowed $20,644.81 for attorney's fees and expenses in the District Court. We do not regard the appeal as frivolous. The application for fees contains only the dates and amounts of the billings of the attorneys to their client; we were not furnished any itemization of services rendered in this Court, nor any information as to the reasonable value thereof. We have examined appellee's 29-page brief and we have heard the arguments of counsel. The issues in this appeal were not complex and we must assume that counsel possessed some familiarity with the law because of the trial, briefs and arguments in the District Court. In view of the large allowance in the District Court we are not inclined to make an additional allowance for services to sustain the judgment of that Court. The application for fees and expenses is denied.

Affirmed.

MOTION TO AMEND THE MARCH 12, 1974 JUDGMENT, IN FORMAL PARTICULARS

(Filed April 1, 1974)

Plaintiff-Appellee, Monogram Models, Inc., respectfully requests that the Judgment of March 12, 1974 be amended in the following particulars:

Page 4, lines 29-33, now reads as follows:

> "Thus it is neither the assembled plane, as a structure, nor the individual pieces of the unassembled plane, that are the proper subject for copyright protection. It is the scale model airplane kit, as a kit, that is copyrightable."

It is respectfully suggested that the above statement would be more apt if changed to read:

> "Thus it is the scale model airplane kit, as a kit, that is copyrightable. We make no holding as to whether an assembled scale model plane, as a structure, or the individual pieces of an unassembled scale model plane, would be proper subjects for copyright protection if published apart from their inclusion in kits."

STATEMENT OF REASONS

Plaintiff requests entry of an order consistent with the instant motion so as to eliminate any possible basis for misinterpreting the Court's Judgment. In both Judgments rendered in this case, on September 17, 1971 and on March 12, 1974, the Court has held that scale model airplane kits are proper subject matter for copyright protection. The questions of whether a unitary plane assembled from one of plaintiff's kits or whether individual pieces of an unassembled scale model plane are proper subjects for copyright protection have not been presented to this Court in the instant case.

On page 7 of the September 17, 1971 Judgment the Court held: " 'practically anything novel can be copyrighted' " . . . "so long as it is 'original' ". This statement seems to indicate that a plane assembled from a scale model kit and individual pieces of an unassembled scale model plane may be proper subjects for copyright protection if published separately from a kit. However, the sentence beginning on line 29 of page 4 of the March 12, 1974 Judgment might be interpreted to mean that an assembled plane and individual pieces of an unassembled scale model plane would not be proper subject matter for copyrights, even if published apart from their inclusion in kits. Plaintiff's proposed amendment of the March 12, 1974 Judgment will remove this inconsistency in possible interpretation of the two Judgments and will obviate any basis for misconstruing the more recent Judgment.

The proposed amendment will show that the Court's holdings in this case are limited to the issue of copyrightability of scale model plane kits and that the Court is not deciding other issues not raised here. Entry of this proposed amendment to the Judgment of March 12, 1974 is, therefore, respectfully requested.

ORDER

(Filed April 10, 1974)

Before WEICK and MILLER, Circuit Judges, and O'SULLIVAN, Senior Circuit Judge.

We are of the view that the issues raised by appellants in their petition for rehearing were adequately dealt with by this Court in its prior opinion reported in 448 F.2d 284 (6th Cir. 1971), by the District Court upon remand, and by our opinion in the present appeal.

The petition for rehearing is denied.